83415-6

NO. 26677-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

WILLIAM A. BROUSSEAU,

Defendant/Appellant.

APPELLANT'S BRIEF

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1. Admission of J.R.'s statements to Ellen Klein, Carla Metcalf, Janet Beitelspacher and Deputy Nichols improperly bolstered J.R.'s testimony.

2. The trial court's Findings of Fact 2.5, 2.6, 2.7 and 2.9, entered after the child competency hearing are not supported by the record. (CP 82; Appendix "A")

3. The trial court's determination that J.R. was competent to testify is erroneous. Conclusion of Law 3.1. (CP 83; Appendix "B")

4. William Austin Brousseau did not receive effective assistance of counsel.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is RCW 9A.44.120 adverse to RCW 9A.44.020(1), the common law, and the Rules of Evidence?

2. Did the admission of J.R.'s statements to the other witnesses constitute improper bolstering and opinion evidence on her credibility?

3. Was J.R. competent to testify at trial?

4. Was defense counsel ineffective when she failed to object to Ms. Metcalf's opinion of J.R.'s credibility and/or Deputy Nichols' unresponsive answer placing an imprimatur upon the actions of the prosecuting attorney and the Court which amounted to a comment upon J.R.'s credibility?

STATEMENT OF THE CASE

On December 4, 2006 seven (7) year-old J.R. told her eight (8) year-old friend Casey that her dad asked her to play with his penis that morning. (Trial RP 103, ll. 16-17; RP 105, ll. 8-9; RP 114, ll. 3-5; ll. 8-12; RP 662, l. 4)

Ellen Klein, Casey's grandmother, drives the girls to school each morning. Casey urged J.R. to tell Ms. Klein what happened. When questioned by Ms. Klein J.R. stated: "My Dad asked me to play with his penis." (Trial RP 162, ll. 15-16; RP 163, ll. 17-20; RP 164, ll. 7-12; RP 170, l. 24 to RP 171, l. 9)

Ms. Klein then asked J.R. if her dad had ever touched her privates. She answered: "Yeah, sometimes." When asked what he does she responded: "He just tickles it, but sometimes it hurts me." (Trial RP 172, ll. 5-10)

Ms. Klein went to work. After thinking about what J.R. told her she called Carla Metcalf, a counselor at Highland Elementary School. Ms. Metcalf had J.R. come to her office. J.R. repeated what she had told Ms. Klein. (Trial RP 190, ll. 5-6; RP 193, ll. 11-16; RP 197, ll. 11-12; RP 198, ll. 11-13; ll. 15-16)

Ms. Metcalf contacted CPS worker Janet Beitelspacher. Ms. Beitelspacher contacted the Asotin County Sheriff's Office. She and Deputy Nichols went to Highland Elementary to interview J.R. J.R. again repeated what she had told Ms. Klein and Ms. Metcalf. (Trial RP 217, ll. 1-2; RP 226, ll. 17-19; RP 236, ll. 14-18; RP 399, ll. 6-7; RP 409, ll. 15-17)

Deputy Nichols continued to question J.R. She told the deputy that her dad pulled her on top of him and that her mouth was close to his penis. She kept saying "no." He eventually grabbed her hands and put them on his penis. (Trial RP 237, ll. 10-17; ll. 20-22; RP 409, ll. 2-25)

When questioned about whether her dad had ever touched her privates she acknowledged that he had. She pointed to her vaginal area as being her privates. (RP 238, ll. 1-2; RP 408, l. 14 to RP 409, l. 1)

As Deputy Nichols continued to question her, J.R. made the following statements:

> "He kept on rubbing me. I didn't want him to."

"He opened it, and put his finger in, and it hurt."

(Trial RP 239, ll. 20-21; RP 240, ll. 5-10; RP 411, ll. 7-17; RP 413, ll. 1-2)

The State filed an Information on December 7, 2006 charging Mr. Brousseau with first degree child rape. (CP 1)

An Amended Information was filed on January 22, 2007 adding a second count of first degree child molestation. (CP 39)

A child competency hearing was conducted. J.R. did not testify. Dr. Scott Mabee, a licensed psychologist, interviewed J.R. prior to the competency hearing. Dr. Mabee was called as a witness by Mr. Brousseau. (03/27/07 RP 25, l. 5; RP 28, ll. 9-10)

Dr. Mabee testified that J.R. had the capacity to appreciate the need to be truthful. She could understand simple and direct questions. (03/27/07 RP 36, ll. 14-15; RP 43, ll. 1-3; RP 94, ll. 17-18; RP 95, ll. 15-18)

Dr. Mabee further testified that J.R. had the capacity to store information; but had difficulty in recalling it insofar as her immediate or short-term memory. (03/27/07 RP 40, ll. 4-10; RP 42, ll. 10-13; RP 94, ll. 24-25)

Finally, Dr. Mabee indicated that J.R.'s capacity for offering accurate testimony was impaired. Her description of the event was mnemonic in nature. (03/27/07 RP 43, ll. 13-16; RP 48, ll. 4-7; RP 95, ll. 20-24)

When defense counsel asked for an opportunity to have the Court examine J.R., or, alternatively, to question her, the request was denied. (03/27/07 RP 110, ll. 1-20; RP 115, ll. 23-25)

The Court concluded that J.R. was competent to testify. It entered findings of fact and conclusions of law on March 30, 2007. (CP 69)

The Court also conducted a child hearsay hearing. Ms. Klein, Ms. Metcalf, Ms. Beitelspacher and Deputy Nichols all testified. (03/27/07 RP 127, ll. 10-11; 03/30/07 RP 12, ll. 5-8; RP 46, l. 25; RP 76, ll. 19-22)

The Court determined that J.R.'s statements to Deputy Nichols were testimonial; but that they were non-testimonial as to Ms. Klein, Ms. Metcalf and Ms. Beitelspacher. The Court entered findings of fact and conclusions of law on April 18, 2007. (CP 81; 03/30/07 RP 127, l. 23 to RP 131, l. 7; RP 131, l. 16 to RP 132, l. 17)

J.R. testified as follows at trial:

> Q: Do you remember the last day that you lived in, ah, in the house with Austin?
>
> A: Before he did something bad.

(Trial RP 113, ll. 20-22)

> Q: What can you tell me -- what is the first thing you remember about that day?
>
> A: That he made me play with his penis.

(Trial RP 114, ll. 3-5)

Q: ... Can you do me a favor and explain that as much as you can about that incident, or about -- about that thing, about what went on?

A: He went into my bedroom, and I think he was trying to wake me up for school. Then he grabbed my hands really tight.

Q: Okay.

What happened then?

A: Then he put them up to his private.

Q: Okay.

Were you in bed, at the time?

A: Yes.

Q: Where was he in the room?

A: He was standing right by my bed.

Q: He was standing up?

A: Yes.

Q: Like I am now?

A: Yes.

(Trial RP 116, ll. 7-21)

Q: Did he have any clothes on?

A: No.

(Trial RP 116, l. 25 to RP 117, l. 1)

Q: Do you remember Austin ever doing anything like that on any other time?

A: No.

(Trial RP 122, l. 25 to RP 123, l. 2)

Q: Has Austin ever touched you on any part of your body that made you uncomfortable?

A: Yes.

Q: Where did he touch you?

A: On the private.

Q: The private you were talking about earlier?

A: Yes.

(Trial RP 126, ll. 8-12)

Q: Did you feel bad on the inside, or did it -- how did it feel on the outside?

A: It didn't feel so good on the outside.

Q: How about on the inside?

A: Didn't feel so good in the inside either.

(Trial RP 126, ll. 19-23)

Teresa Forshag, a nurse practitioner, conducted a physical examination of J.R. It was normal. She testified that insertion of a finger may be painful; but not cause any damage. (Trial RP 387, ll. 13-14; RP 390, ll. 10-12; RP 391, ll. 23-25; RP 393, ll. 13-17)

Sara Parsons is J.R.'s mother. She testified that J.R. had made a prior claim of sexual abuse. J.R. is not married. Mr. Brousseau is J.R.'s stepfather. Mr. Brousseau is twenty-seven (27) years of age. (Trial RP 106, l. 25; 454, ll. 1-4; ll. 6-8; RP 458, ll. 9-10; RP 465, ll. 14-16; RP 467, ll. 8-16)

Ms. Parson's also indicated that J.R. has a selective memory when it comes to details. (Trial RP 502, ll. 8-18)

When Mr. Brousseau was initially contacted by Deputy Nichols he advised her that J.R. had made a similar complaint approximately a year and a half ago. Ms. Beitelspacher checked with Idaho authorities and could not confirm that any complaint was made. (Trial RP 253, ll. 19-25; RP 437, ll. 5-19)

Mr. Brousseau's defense was that J.R. was transferring the prior event to him. Dr. Esplin, a forensic psychologist, testified on Mr. Brousseau's behalf. He stated that in eighty (80%) to ninety (90%) percent of sex abuse cases there is no physical evidence available. (Trial RP 519, l. 1; RP 523, ll. 3-6)

In response to a juror question Dr. Esplin stated that a child may transfer a "core element" from an event to another person. "Core elements are the most important details ... that people tend to focus on, and remember better than other kind of details." (Trial RP 532, ll. 19-21; RP 610, ll. 9-11)

Ms. Klein testified that J.R. occasionally lied to her about having permission to visit her home. (Trial RP 187, ll. 1-4)

Ms. Metcalf testified, without objection, that she had not known J.R. to lie or be dishonest in any way. (Trial RP 202, ll. 17-18)

Defense counsel did not move to strike the following testimony which occurred during cross-examination of Deputy Nichols:

> Q: Well, deputy, I have to ask.
>
> This is a pretty important case. Why would you only devote one day to it?
>
> A: Well, like I said, I was leaving town, so I couldn't follow up.
>
> And so I did -- I passed it on to the prosecutor's office.
>
> They reviewed it.
>
> They showed it to a judge, and a warrant was issued for Mr. Brousseau's arrest.
>
> He was arrested, and, ah, you were appointed as his attorney, I believe.

(Trial RP 274, ll. 18-25; RP 275, ll. 1-3)

Mr. Brousseau testified. He denied touching J.R. He admitted that he sleeps in the nude. He described J.R.'s prior disclosure where another adult had her play with his penis and suck it while they were taking a

shower. (Trial RP 620, l. 14 to RP 621, l. 2; RP 631, ll. 5-14; RP 640, ll. 15-24)

Mr. Brousseau was found guilty on both counts. (CP 150; CP 151)

A sentencing hearing was conducted on November 26, 2007. Mr. Brousseau challenged his Minnesota "simple robbery" conviction on the basis of comparability. (CP 178; 11/26/07 RP 10, l. 24 to RP 11, l. 23)

The trial court determined that Mr. Brousseau's offender score was a six (6). Judgment and Sentence was entered on November 26, 2007. (CP 192)

Mr. Brousseau filed his Notice of Appeal on December 12, 2007. (CP 202)

SUMMARY OF ARGUMENT

J.R. was not competent to testify.

There was no corroborating evidence that J.R. was sexually abused.

J.R.'s hearsay statements were used to bolster her credibility even though it was not attacked *per se.*

Defense counsel's failure to object to testimony concerning J.R.'s credibility by Ms. Metcalf and Deputy Nichols' unresponsive answer, bringing into play the aegis of authority surrounding the prosecutor's office and the Court, constitutes ineffective assistance of counsel.

ARGUMENT

"Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"Lord, I believe; help my disbelief." Mark 9:24.

Ellen Klein did not disbelieve J.R. She contacted the school counselor.

Carla Metcalf did not disbelieve J.R. She contacted CPS.

Janet Beitelspacher did not disbelieve J.R. She contacted the police.

Deputy Nichols did not disbelieve J.R. She contacted the prosecuting attorney.

The prosecuting attorney did not disbelieve J.R. He filed an Information.

I. RCW 9A.44.120

The Legislature, in order to guarantee that neither a judge nor a jury would disbelieve a child witness in a sex offense case, enacted RCW 9A.44.120.

RCW 9A.44.120 provides, in part:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another ... not otherwise admissible by statute

> or court rule, is admissible in ... criminal proceedings ... in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. ...

Yet, the Legislature also enacted RCW 9A.44.020(1) which clearly states:

> In order to convict a person of any crime defined in this chapter **it shall not be necessary that the testimony of the alleged victim be corroborated.**

(Emphasis supplied.)

Prior to the 2005 update, WPIC 45.02 allowed an instruction to be given based upon RCW 9A.44.020(1). Since the update no pattern instruction is proposed. The COMMENT to WPIC 45.02 states that "... since 1913 the law of Washington has followed the common law rule that no corroboration is necessary."

The COMMENT further provides:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a le-

> gal problem. **Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.**

(Emphasis supplied.)

Mr. Brousseau asserts that the child hearsay statute is an aberration. It ignores prior statutory authority, the common law, and Court rules.

> **"Hearsay" is a statement**, other than one made by the declarant while testifying at the trial or hearing, **offered in evidence to prove the truth of the matter asserted.**

ER 801(c). (Emphasis supplied.)

J.R. testified at trial. Ms. Klein, Ms. Metcalf, Ms. Beitelspacher, and Deputy Nichols were all allowed to repeat what J.R. said to them. The sole purpose of this repetition was to prove the truth of the matter asserted. This was accomplished by using J.R.'s prior consistent statements.

ER 801(d) states, in part:

> **A statement is not hearsay if –**
> (1) *Prior Statement by a Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition, or (ii) consistent with the declarant's testimony and is **offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive**, ...

(Emphasis supplied.)

J.R.'s statements were not offered under ER 801(d)(1)(i). The testimony was offered in the State's case-in-chief. It was not offered to rebut any aspect of J.R.'s cross-examination.

Mr. Brousseau contends that there was no allegation of recent fabrication by J.R.

> ("The general common-law rule is that the proponent may not bolster the witness's credibility before any attempted impeachment."); *United States v. Holmes,* 26 F. Cas. 349, 352 (C.C.D. Me. 1858) ("No principle in the law of evidence is better settled than ... the rule, that **testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it.**").

State v. Bourgeois, 133 Wn.2d 389, 400-401, 945 P.2d 1120 (1997). (Emphasis supplied.)

It is Mr. Brousseau's position that when a child testifies at trial, and testifies concerning sexual contact or a sexual act, that corroborative evidence should be precluded in the absence of any claim of recent fabrication.

The purpose behind RCW 9A.44.120 is clearly defined in *State v. Jones,* 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989):

> RCW 9A.44.120 is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse. Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on

> the testimony of the child victim to make their cases. Children are often ineffective witnesses, however. Feeling intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, other relative or friend, children often are unable or unwilling to recount the abuses committed on them. In addition, children's memories of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements children make outside the courtroom, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses.

Date rapes and other acts of sexual misconduct involving adults generally occur in private.

Physical evidence is not always present in cases of rape or indecent liberties.

Prosecutors have to rely on adult testimony just as often as they do a child's testimony to prove a case.

There is no guarantee that an adult witness is going to testify as expected. Emotional reactions, the pressure of cross-examination, unfamiliarity with court procedures, embarrassment in describing intimate details of a sexual nature, and similar factors equally apply to adult witnesses.

As described by Dr. Esplin, lapse of time impacts memory as to details, but not "core elements." Each witness should be evaluated by the

trier-of-fact on the basis of their demeanor and testimony; not on assertions of credibility based upon character and lay opinion.

Mr. Brousseau argues that there is no corroborating evidence to support J.R.'s disclosure. Rather, the admission of J.R.'s statements through the other witnesses was aimed solely at bolstering her credibility.

Corroborative evidence has been discussed by the Courts on other occasions.

> In *Swan* [*State v. Swan,* 114 Wn.2d 613, 624-40, 790 P.2d 610 (1990)], the victims' hearsay statements were corroborated by parallel disclosures, precocious sexual knowledge, masturbatory behavior, behavior with an anatomically correct doll, complaints of pain, and other physical and emotional evidence.

Dependency of A.E.P., 135 Wn.2d 208, 232, 956 P.2d 297 (1998).

There are no parallel disclosures. J.R. is the only alleged victim.

There is no testimony concerning masturbatory behavior.

J.R. did not use an anatomically correct doll.

J.R. did not complain of pain following the incident.

The State did not present any physical or emotional evidence of sexual abuse.

J.R.'s physical exam does not corroborate any abuse.

> While an inconclusive exam does not rule out the possibility of abuse, neither does it corroborate the hearsay statements. [The] physical exam was consistent with digital fondling, but that evidence does not cor-

> roborate ... statements alleging ... [touching].

Dependency of A.E.P., supra.

The most that can be said is that J.R. had some sexual knowledge concerning anatomy. She testified that Mr. Brousseau taught her the word "penis." Her grandmother taught her the word "vagina." (Trial RP 136, ll. 3-6; ll. 18-19)

> ... [W] e perceive that the determination of whether "there is corroborative evidence of the act" involving a balancing of the statute's goal of making child victim hearsay more readily available as evidence, against the concern that the use of such hearsay should not create too great a risk of an erroneous conviction. The Legislature has offered no specific guidance on how this balance is to be struck. Similarly, we feel it unwise to suggest any hard and fast rules. The determination must proceed case by case, with a view to the competing goals and concerns discussed ....
>
> Certainly the best sort of corroborative evidence would be direct physical or testimonial evidence of the abuse. *See, e.g., State v. Justiniano,* 48 Wn. App. 572, 581, 740 P.2d 872 (1987) (eyewitness testimony to abuse); *State v. Gitchel,* 41 Wn. App. 820, 823, 706 P.2d 1091 (medical evidence of abuse), *review denied,* 105 Wn.2d 1003 (1985) .... Fairly commonly, however, such direct evidence is not available. Thus, evidence that is only indirectly corroborative must be deemed sufficient in many cases. *See, e.g., State v. Hunt,* 48 Wn. App. 840, 848-50, 741 P.2d 566 (child-victim's precocious knowledge of sexual activity), *review denied,* 109 Wn.2d 1014 (1987); *State v. Robinson,* 44 Wn. App. 611, 621, 722 P.2d

> 1379 (semen stain on child's blanket), *review denied,* 107 Wn.2d 1009 (1986); *State v. Gitchel, supra* at 828 (child's nightmares); *see also State v. Petry,* 524 N.E.2d 1293, 1300 (Ind. Ct. App. 1988) (psychological evidence); ... The statute's essential purposes should not be defeated by a stubborn insistence on corroboration that is impossible to obtain.

State v. Jones, supra, 495-96.

Again, the State presented no corroborative evidence that the incident occurred.

> ... [C]orroborating evidence is admissible only when a witness' credibility has been attacked by the opposing party and, even then, only on the facet of the witness' character or testimony which has been challenged.

State v. Froehlich, 96 Wn.2d 301, 305, 635 P.2d 127 (1981).

The Legislature, in enacting RCW 9A.44.120, bowed to public pressure. The Courts, in interpreting RCW 9A.44.120, have also been unduly influenced by public opinion.

No legislator, and no judge, wants to be considered soft on child sex abuse. Thus, to guarantee that an accused child sex abuser is convicted, the child hearsay statute is used as an unsheathed sword.

An unsheathed sword creates potential for convictions based upon emotion as opposed to reason.

The verdicts in Mr. Brousseau's case should be overturned.

II. COMPETENCY

> *State v. Allen,* 70 Wn.2d 690, 424 P.2d 1021 (1976), sets forth the test for determining the competency of a child witness. The child witness must demonstrate:
>
> > (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.
>
> 70 Wn.2d at 692. *See also* CrR 6.12(c)(2). The responsibility for determining a witness' competency rests with the trial court, **who "saw the witness, noticed her manner and considered her capacity and intelligence."** *State v. Johnson,* 28 Wn. App. 459, 461, 624 P.2d 213 (1981), *aff'd* 96 Wn.2d 926 (1982). We review the trial court's ruling only for an abuse of discretion. 28 Wn. App. at 460.

State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995). (Emphasis supplied.)

The trial court did not see J.R.

The trial court had no opportunity to determine J.R.'s manner.

The trial court did not independently consider J.R.'s capacity and intelligence.

The trial court denied Mr. Brousseau the opportunity of bringing J.R. before the Court.

The trial court relied upon Dr. Mabee's testimony. Dr. Mabee indicated deficiencies in J.R.'s competency.

The trial court clearly abused its discretion in determining J.R. was a competent witness. Competency cannot be determined in the absence of a pre-trial examination of the witness.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

> Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. To successfully challenge the effective assistance of counsel, [a] petitioner must satisfy a two-part test. Petitioner must show that: (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there was a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome."

Personal Restraint of Davis, 152 Wn.2d 647, 673-73, 101 P.3d 1 (2004), *citing Strickland v. Washington,* 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) and *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

It cannot be doubted that defense counsel's performance was deficient. The failure to object to Ms. Metcalf's comment upon J.R.'s credibility cannot be countenanced.

"To protect a defendant's right to an unbiased jury, '[a] witness may not give an opinion as to another witness's credibility.'" *State v. Castro,* 141 Wn. App. 485, 492 (2007), *citing State v. O'Neal,* 126 Wn. App. 395, 409, 109 P.3d 429 (2005), *aff'd,* 159 Wn.2d 500, 150 P.3d 1121 (2007).

Numerous cases have addressed opinion testimony concerning credibility. *See: State v. Stevens,* 127 Wn. App. 269, 110 P.3d 1179 (2005) (allowing an investigating officer to testify that the statements between two (2) alleged victims were consistent constituted an implied opinion on credibility); *State v. Thach,* 126 Wn. App. 297, 106 P.3d 782 (2005) (allowing a doctor to testify that he believed a domestic violence victim's explanation of what happened improper); *State v. Alexander,* 64 Wn. App. 147, 822 P.2d 1250 (1992) (asking a counselor whether a child gave any indication of lying during an interview improper); *State v. Smith,* 56 Wn. App. 909, 786 P.2d 320 (1990) (allowing a detective to testify that a child was given a test to determine whether the child could distinguish between the truth and a lie, including a comment that the child "did extremely well on the test" improper); *State v. Fitzgerald,* 39 Wn. App. 652, 694 P.2d 1117 (1985) (expert opinion that child was telling the truth about the incident improper).

Moreover, Deputy Nichols' unresponsive answer to defense counsel's question implicated Mr. Brousseau's constitutional right to counsel by referencing that defense counsel was court-appointed. Failure to move to strike that answer only exacerbated the bolstering of J.R.'s testimony.

Deputy Nichols testimony also made the prosecuting attorney and Court a part of the opinion on J.R.'s credibility.

> A jury might well believe that such a statement by a sworn officer of the law, in whom they have confidence, might indicate that such officer was acquainted with facts which had not been disclosed to the jury by the testimony. Such a statement throws into the scales the weight and influence of the personal character of counsel for the state, and, to some extent at least, calls upon the jury to support his judgment.

State v. Susan, 152 Wash. 365, 380, 278 P. 149 (1920).

Finally, Ms. Metcalf's and Deputy Nichols statements are sufficiently explicit to support Mr. Brousseau's argument that they believed J.R. The issue is reviewable under RAP 2.5(a). *See: State v. Kirkman,* 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

CONCLUSION

Mr. Brousseau's convictions should be reversed and the case remanded for a new trial.

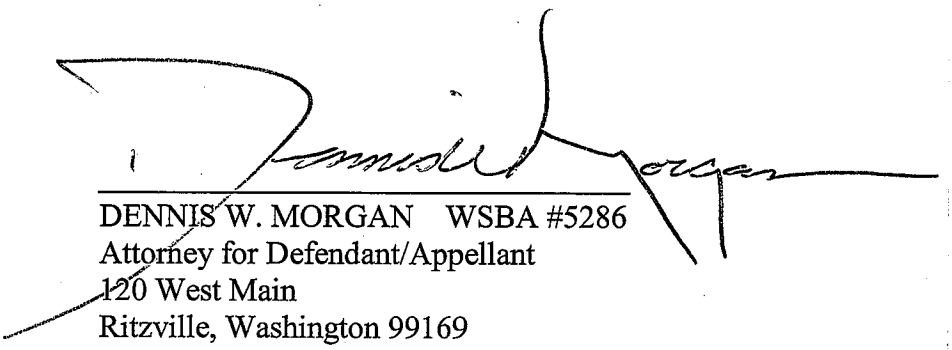
J.R. was not properly determined to be competent to testify.

Improper bolstering of J.R.'s testimony through uncorroborated hearsay statements denied Mr. Brousseau a constitutionally fair trial.

Ineffective assistance of counsel compounded the error.

DATED this 25th day of June, 2008.

Respectfully submitted,



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APPENDIX "A"

2.5 It is undisputed that Jane Doe (D.O.B.: 11/08/1999) had the mental capacity at the time of the occurrence of the event she is to testify about to receive an accurate impression of it;

2.6 Although Dr. Mabee testified that Jane Doe (D.O.B.: 11/08/1999) had limited memory capacity, it is not disputed that Jane Doe (D.O.B.: 11/08/1999) remembers her perception of Defendant's actions giving rise to current charges. Additionally, Dr. Mabee testified that Jane Doe (D.O.B.: 11/08/1999) could remember several details about a room she had not visited in over three and a half months. This Court therefore finds that Jane Doe (D.O.B.: 11/08/1999) has a memory sufficient to retain an independent recollection of the occurrence;

2.7 Dr. Mabee testified, and the police reports on file (stipulated to by Defendant for this hearing) confirm, that Jane Doe (D.O.B.: 11/08/1999) has expressed in words her memory of the occurrence, and has in fact done so on several occasions;

2.9 The evidence and argument by Defendant, along with the case file herein, provides insufficient basis to overcome the statutory presumption that Jane Doe (D.O.B.: 11/08/1999) is competent to testify in this matter.

APPENDIX "B"

3.1 Jane Doe (D.O.B.: 11/08/1999) is competent to testify in the above-captioned cause.